

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

NETSCAPE COMMUNICATIONS CORP.,)	
)	
Plaintiff,)	Civil Action No. 1:09-cv-225-TSE-TRJ
)	
v.)	
)	
VALUECLICK, INC., MEDIAPLEX, INC.,)	
FASTCLICK, INC., COMMISSION)	
JUNCTION, INC., MEZIMEDIA, INC.,)	
and WEB CLIENTS, L.L.C.,)	
)	
Defendants.)	

**NETSCAPE COMMUNICATIONS CORP.'S
OBJECTIONS TO DEFENDANTS' TRIAL WITNESS LIST**

Netscape Communications Corp. respectfully submits the following objections to Defendants' Trial Witness List (Dkt. No. 391).

Netscape objects to the Trial Witness List to the extent it includes Jim Zarley. Upon information and belief, Jim (James A.) Zarley became the President and Chief Executive Officer of defendant ValueClick, Inc. on April 9, 2010. Neither Mr. Zarley nor ValueClick's previous Chief Executive Officer (Tom Vadnais) were listed on Defendants' Amended and Supplemental Combined Updated Initial Disclosures (the "Initial Disclosures"), which were served on September 24, 2009 (Ex. A), pursuant to Fed. R. Civ. P. 26(a)(1). In accordance with Fed. R. Civ. P. 37(c)(1), Mr. Zarley should be precluded from testifying at trial.

Netscape further objects to the Trial Witness List to the extent that it includes Christopher Day. Mr. Day is an Assistant General Counsel for Patent Litigation, Prosecution, and Licensing at AOL Inc. Defendants' Initial Disclosures only listed Mr. Day as an individual likely to have discoverable information concerning Defendants' state law *counterclaims*. See Ex. A at 24. Mr.

Day was *not* listed on Defendants' Initial Disclosures for any other issue, such as infringement, validity, damages, or Defendants' equitable defenses. By an Order dated January 29, 2010 (Dkt. No. 293), this Court granted Netscape's motion for summary judgment that Defendants' state law counterclaims were preempted, and thus this Court dismissed the state law counterclaims by the same Order. Because the only disclosed area of relevance of Mr. Day's testimony has been eliminated from this case, Mr. Day should not be called by Defendants to testify at trial at all. Indeed, Mr. Day was deposed in this case on May 26, 2009, and Defendants' subsequently served initial disclosures, dated June 10, 2009 (Ex. B), failed to list Mr. Day at all. Only after Defendants asserted their state law counterclaims on July 23, 2009 (Dkt. No. 146) did they include Mr. Day on their Initial Disclosures, and when Defendants did so, they only listed Mr. Day in connection with their now-moot state law counterclaims. Accordingly, pursuant to Fed. R. Civ. P. 37(c)(1), Defendants should be precluded from calling Mr. Day to testify at trial or presenting his deposition testimony.

Netscape also objects to the Trial Witness List to the extent it includes Lawrence Stewart. For the reasons set forth in Netscape's concurrently filed Motion to Bar Witness Lawrence Stewart and his Testimony at Trial, Netscape objects to Mr. Stewart testifying at trial by any means or format.

Dated: April 21, 2010

Respectfully submitted,

/s/ Robert L. Burns

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2010, I will electronically file the foregoing **Netscape Communications Corp.'s Objections to Defendants' Trial Witness List** with the Clerk of the Court using the CM/ECF system, which will then send notification of such filing (NEF) to the following:

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